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IN THE
SUPREME COURT OF THE UNITED STATES

EDITH JONES, et al.,
Petitioners,

v.

R.R. DONNELLEY & SONS CO.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW; MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND; NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM; NATIONAL EMPLOYMENT LAWYERS ASSOCIATION; PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC., AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST

The *amici* submit this brief with consent of the parties, in support of the Petitioners' argument that the Seventh Circuit improperly held that the four-year statute of limitations established under 28 U.S.C. § 1658 does not apply to the Petitioners' post-contract claims under 42 U.S.C. § 1981. Further, the *amici* contend that 28 U.S.C. § 1658 applies to all cases filed under 42 U.S.C. § 1981 involving discriminatory acts after the date of enactment of the Civil Rights Act of 1991, independent of whether these acts occurred before or after contract formation.[1]

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a tax-exempt, nonprofit civil rights legal organization that was founded in 1963 by the leaders of the American bar, at the request of President John F. Kennedy, in order to provide legal representation to victims of civil rights violations. Over the last 40 years, the Lawyers' Committee and its local affiliates in Boston, Chicago, Denver, Los Angeles, Philadelphia, San Antonio, San Francisco, and Washington have represented members of minority groups and women in hundreds of civil rights cases. In furtherance of its efforts to help defend the civil rights of minorities and the poor, the Lawyers' Committee has been continually involved as *amicus curiae* in cases before the Court involving the proper scope and coverage afforded by federal civil rights laws.

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[1] Counsel for *amici curiae* authored this brief in the entirety. No person or entity other than the *amici curiae*, their staff, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been filed with the Clerk of the Court pursuant to Supreme Court rule 37.3.

The Mexican American Legal Defense and Educational Fund ("MALDEF") is a national civil rights organization established in 1968. Its principal objective is to secure, through litigation, advocacy, and education, the civil rights of Latinos living in the United States. MALDEF has litigated numerous cases under 42 U.S.C. § 1981 since the organization's founding. Preserving the right of Latinos to be free of discrimination in all aspects of employment is a primary goal of MALDEF's employment program.

The National Association for the Advancement of Colored People ("NAACP"), established in 1909, is the nation's oldest civil rights organization. The NAACP has state and local affiliates throughout the nation, including the State of Maryland where it maintains its national headquarters. The fundamental mission of the NAACP includes promoting equality of rights, eradicating caste and race prejudice among the citizens of the United States and securing for African Americans and other minorities increased opportunities for employment. The NAACP has appeared before courts throughout the nation in numerous important civil rights cases, including employment cases.

The National Asian Pacific American Legal Consortium ("NAPALC") is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Pacific Americans. Collectively, NAPALC and its affiliates, the Asian Law Caucus and the Asian Pacific American Legal Center of Southern California, have over 50 years of experience in providing legal public policy, advocacy, and community education on discrimination issues. NAPALC and its affiliates have a long-standing interest in employment discrimination and civil rights issues that have an impact on the Asian Pacific American community, and this interest has resulted in

NAPALC's participation in a number of *amicus curiae* briefs before the courts.

The National Employment Lawyers Association ("NELA") is the only professional membership organization in the country comprised of lawyers who represent employees in labor, employment and civil rights disputes. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been victims of unlawful employment discrimination. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

The Puerto Rican Legal Defense and Education Fund, Inc. ("PRLDEF") is a national non-profit civil rights organization founded in 1972. PRLDEF is dedicated to protecting and furthering the civil rights of Puerto Ricans and other Latinos through litigation and policy advocacy. Since its inception, PRLDEF has participated both as direct counsel and as *amicus curiae* in numerous cases throughout the country concerning the proper interpretation of the civil rights laws.

The precise issue before the Court is the appropriate statute of limitations for claims under 42 U.S.C. § 1981 based on discriminatory acts after contract formation. A decision here may also impact the issue of the proper statute of limitations applicable to all cases under 42 U.S.C. § 1981 involving discriminatory acts after the date of enactment of the Civil Rights Act of 1991, regardless of whether these discriminatory acts occurred before or after contract formation. This case is of significant importance to the preservation and enforcement of the rights of the clients and communities served by the *amici*.

SUMMARY OF ARGUMENT

The *amici* support the Petitioners' position that the four-year statute of limitations established under 28 U.S.C. § 1658 applies to all cases under 42 U.S.C. § 1981 involving discriminatory acts after contract formation. However, to the extent that the Court reaches the issue, the *amici* believe that the four-year statute of limitations established under 28 U.S.C. § 1658 applies to all cases under 42 U.S.C. § 1981 alleging discriminatory acts after the date of the enactment of the Civil Rights Act of 1991, independent of whether these acts occurred before or after contract formation.

The *amici's* interpretation that 28 U.S.C. § 1658 applies to all 42 U.S.C. § 1981 cases based upon discriminatory acts after the date of enactment of the Civil Rights Act of 1991 is consistent with the plain language of 28 U.S.C. § 1658 and the well-established meaning of the terms used in it. Civil actions under 42 U.S.C. § 1981 concerning discrimination after contract formation "arise under" the Civil Rights Act of 1991 because this discrimination was not actionable under 42 U.S.C. § 1981 until the passage of the 1991 law. Indeed, the Court recognized in *Rivers v. Roadway Express, Inc.*, that the amendments to § 1981 in the Civil Rights Act of 1991 "create[d] liabilities that had no legal existence before the Act was passed." 511 U.S. 298, 313 (1994).

Moreover, civil actions involving discriminatory acts prior to contract formation but after the Civil Rights Act of 1991 also "arise under" the 1991 Act. When Congress enacted the Civil Rights Act of 1991 to provide for new causes of action after contract formation under 42 U.S.C. § 1981, they chose to do so *not by creating a separate provision, but by creating a new, integrated cause of action*, which prohibits discriminatory acts either before or after

contract formation. After the Civil Rights Act of 1991, acts of employment discrimination, irrespective of whether the acts occurred prior to, during, or after contact formation, constitute a claim for violation of § 1981. Thus, the four-year statute of limitations applies to all claims under § 1981 that occur after the passage of the Civil Rights Act of 1991.

Further, applying a four-year statute of limitations for this new, integrated cause of action under § 1981, rather than applying different federal and state statutes of limitations, honors Congress' intent to establish a uniform statute of limitations for federal causes of action created after enactment of § 1658. Finally, an across the board four-year statute of limitations provides a "bright-line" test that is easily applied and understood by litigants and the courts, thereby promoting judicial efficiency and economy.

ARGUMENT

THE FOUR-YEAR STATUTE OF LIMITATIONS ESTABLISHED UNDER 28 U.S.C. § 1658 APPLIES TO ALL 42 U.S.C. § 1981 CIVIL ACTIONS BASED ON DISCRIMINATORY ACTIONS AFTER THE DATE OF ENACTMENT OF THE CIVIL RIGHTS ACT OF 1991

The *amici* urge the Court to decide that the four-year statute of limitations established under 28 U.S.C. § 1658 applies to all cases under 42 U.S.C. § 1981 alleging discriminatory acts after the date of enactment of the Civil Rights Act of 1991, independent of whether these discriminatory acts occurred before or after contract formation. At a minimum, the *amici* respectfully request that the Court accept the Petitioners' argument that the four-year statute of limitations established under 28 U.S.C. § 1658 applies to all cases under 42 U.S.C. § 1981 involving discriminatory acts after contract formation.

I. THE PLAIN LANGUAGE OF 28 U.S.C. § 1658 AND THE WELL-ESTABLISHED MEANING OF THE TERMS USED IN IT COMPEL THE INTERPRETATION THAT THE FOUR-YEAR STATUTE OF LIMITATIONS IN § 1658 APPLIES TO ALL § 1981 CASES.

28 U.S.C. § 1658, as originally enacted, states:

> Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of enactment of this section may not be commenced later than four years after the cause of action accrues.

Judicial Improvements Act of 1990, Pub. L. 101-650, § 313(a), 104 Stat. 5089 (1990) (amended 2002).[2]

In interpreting a statute "[w]e begin by looking to the language of the Act. . . . [w]hen we find the terms of a statute unambiguous, judicial inquiry is complete, except in 'rare and exceptional circumstances.'" *Rubin v. United States*, 449 U.S. 424, 429-30 (1981) (citations omitted). The Court has observed that "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which the language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). Courts must presume that "Congress 'says in a statute what it means and means in a statute what it says there.'" *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992)). Here, § 1658 says what it means and means what it says.

A. The Civil Rights Act of 1991 Is "An Act of Congress Enacted After the Date of Enactment" of 28 U.S.C. § 1658.

There is no dispute that this case involves a "civil action," i.e. the filing of a non-criminal complaint. Further, there can be little dispute that the Civil Rights Act of 1991 is an "Act of Congress enacted after the enactment" of 42

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[2] 28 U.S.C. § 1658, originally enacted in 1990, was amended in 2002, adding subsection (b) to provide for a separate statute of limitations for various claims of securities fraud. The original language of § 1658 remains the same; however, it is now subsection (a) of 28 U.S.C § 1658. To be clear, when the brief refers to § 1658, it is referring to the currently enacted § 1658(a).

U.S.C. § 1658, which was enacted in 1990. Most obviously, in passing "the Civil Rights *Act* of 1991," Congress included the term Act in its title, included the phrase "*[b]e it enacted*" in the preamble, and further noted that "*This Act* many be cited as the Civil Rights *Act* of 1991." Civil Rights Act of 1991, Pub. L. No. 102-166, Preamble and § 1, 105 Stat. 1071 (1991) (emphasis added).

Although the Civil Rights Act of 1991 did amend § 1981, those amendments are considered an "Act of Congress" because they created new causes of action. That the 1991 Act created new causes of action is beyond dispute. The Court recognized in *Rivers v. Roadway Express, Inc.*, the amendments to § 1981 in the Civil Rights Act of 1991 "create[d] liabilities that had no legal existence before the Act was passed." 511 U.S. 298, 313 (1994).

While not every amendment to an existing law would be an Act of Congress triggering the four-year statute of limitations in § 1658, certainly, amendments that create new rights and liabilities constitute an "Act that Congress enacted."[3] Most Congressional legislation proceeds by amendments to prior legislation. This practice provides efficiency by not requiring restatement and repetition of previously enacted law. As one court observed, "[t]o conclude that when Congress said 'an Act of Congress enacted,' it did not mean an 'amendment of an act,' is splitting hairs in too fine a way to make good sense. Any

[3] For example, any amendment that merely modifies the remedies or makes procedural or technical modifications without creating a new cause of action would not invoke the four year statute of limitations provisions of § 1658 because, as discussed in Section B *infra*, these amendments would not "aris[e] under and Act of Congress" as the phrase "arises under" has traditionally been applied and understood by the Court.

such interpretation seems to defy congressional intent rather than affirm it." *Rodgers v. Apple South, Inc.*, 35 F. Supp. 2d. 974, 976 (W.D. Ky. 1999).

B. All § 1981 Claims "Arise Under" the Civil Rights Act of 1991 Because the Act Creates the Cause of Action and Is a Necessary Element of Any Well-Pleaded § 1981 Complaint.

The crucial question is whether the Petitioners' claim "arises under" the Civil Rights Act of 1991. The term "arising under" has a long history of consistently applied meaning, which has been honored by the Court in interpreting identical language in other statutes.[4] In *Christianson v. Colt Indus. Operating Corp.*, the Court recognized that the term "arising under" has long been interpreted as meaning that the district court's jurisdiction "extends over 'only those cases in which a well-pleaded complaint establishes either that a federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law.'" 486 U.S. 800, 808 (1988) (quoting *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 27-28 (1983)). The *Christianson* Court relied on this established meaning in construing 28 U.S.C. § 1338(a), which confers jurisdiction over "any civil action arising under any Act of Congress relating to patents." 468 U.S. at 807 (quoting 28 U.S.C. § 1338(a)). The Court noted that,

> *Linguistic consistency, to which we have historically adhered*, demands that § 1338(a) jurisdiction likewise extend only to those cases in which a well-pleaded

[4] The most familiar use of the words "arising under" is in 28 U.S.C. § 1331 conferring original jurisdiction on federal district courts over "all civil actions arising under the Constitution, laws and treaties of the United States."

> complaint establishes either that federal patent law creates the cause of action or that the plaintiff's right to relief necessarily depends on a resolution of a substantial question of federal patent law, in that patent law is a necessary element of one of the well-pleaded claims.

486 U.S. at 808-09 (emphasis added). In determining how the words "a civil action arising under an Act of Congress" in 28 U.S.C. § 1658 should be interpreted, the Court must determine whether the Civil Rights Act of 1991 either creates the cause of action or is a necessary element in one of the well-pleaded claims.

The Court in *Patterson v. McLean Credit Union*, held that 42 U.S.C. § 1981, as then worded, "extend[ed] only to the formation of [an employment] contract, but not to problems that may arise later from the conditions of continuing employment." 491 U.S. 164, 176 (1989). After *Patterson* and prior to the enactment of the Civil Rights Act of 1991, § 1981 did not cover discriminatory acts after contract formation, such as discrimination in the conditions of continuing employment or in the termination of employment. In enacting the Civil Rights Act of 1991, Congress, amended 42 U.S.C. § 1981 by defining the phrase "make and enforce contracts" to mean "the making, performance, modification, and termination of contracts and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b). By defining the phrase "make and enforce contracts," Congress created new causes of action for which defendants could be held liable.

Indeed, in determining whether § 101 of the Civil Rights Act of 1991, which amends § 1981, could be applied retroactively, the Court in *Rivers* recognized that § 101

"enlarged the category of conduct that is subject to § 1981 liability. . . . establishing a *new* standard of conduct." 511 U.S. 298, 303-304 (emphasis added). The *Rivers* Court concluded that because the amendments to § 1981 contained in § 101 of the Civil Rights Act of 1991 "*create[d] liabilities that had no legal existence before the [1991] Act was passed*," it would be inappropriate to apply this new cause of action retroactively. 511 U.S. at 313 (emphasis added). Accordingly, under the well-established meaning of the term "arising under," the enactment of the Civil Rights Act of 1991 is an essential element in any civil action involving discrimination after contract formation under 42 U.S.C. § 1981, because the Petitioners had no cause of action for these claims of discrimination prior to the Civil Rights Act of 1991.

Further, civil actions involving discriminatory acts prior to contract formation but after the enactment of the Civil Rights Act of 1991 also "arise under" this Act and are entitled to the four-year statute of limitations. When Congress decided to create a claim for discriminatory acts after contract formation as violations covered under § 1981, it could have accomplished this goal by adding a separate provision to 42 U.S.C. § 1981 covering post-contract discrimination. Instead, it chose to create a new, integrated cause of action through § 1981(a), which now outlaws discriminatory acts both before and after contract formation. Congress created one unified cause of action, specifically allowing interrelated claims of discrimination, both before and after contract formation, to be treated together as a violation of the same provision, § 1981(a).

A review of the text demonstrates such intent. The full text of § 1981, as amended by the Civil Rights Act of 1991, reads:

§ 1981. Equal rights under the law

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefits of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For the purposes of this section, the term "make and enforce contracts" includes the making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under the color of State law.

42 U.S. C. § 1981.

The Civil Rights Act of 1991 created the current version of § 1981, and the ensuing new integrated cause of action, by putting an (a) in front of the prior one sentence text of § 1981, and adding sections (b) and (c). While the words of section (a) remained the same, the meaning of the words in (a) changed substantially when section (b) was added to define the phrase "make and enforce contracts." As

the Court in *Rivers* held, this amendment "enlarged the category of conduct subject to § 1981 liability." 511 U.S. at 303.

The Seventh Circuit below correctly observed that § 1981(b) cannot stand on its own. *Jones v. R.R. Donelley & Sons Co.*, 305 F.3d 721, 727 (7th Cir. 2002) (recognizing that "[a]n action to recover for discriminatory post-formation treatment simply cannot be based solely on § 1981(b). Indeed, without § 1981 (a), § 1981(b) is meaningless"). Although certain causes of action are *made possible* by § 1981(b), there is no such thing as a § 1981(b) claim. Instead, section (b) merely defines what constitutes actionable conduct outlined in section (a). Significantly, section (b) is titled, "'Make and enforce contracts' *defined*." 42 U.S.C. § 1981(b) (emphasis added).

A cause of action is made under this new integrated § 1981, combining the old language now incorporated in § 1981(a) with the new meaning given by § 1981(b). In accordance with this Court's decision in *Rivers*, because this integrated cause of action "establish[es] a *new* standard of conduct" that did not exist prior to the enactment of the Civil Rights Act of 1991, it "arises under" the Civil Rights Act of 1991. 511 U.S. at 304, 313 (emphasis added). Therefore, consistent with the plain language of § 1658, this new integrated cause of action is subject to the four-year statute of limitations, regardless of whether the discriminatory acts occurred before or after contract formation.

C. The Seventh Circuit's Decision to Confine 28 U.S.C. § 1658 to Situations When Congress Establishes a New Cause of Action "Without Reference To Preexisting Law" Is Not in Accordance with the Plain Meaning of the Language or Any Known Usages of the Terms in § 1658.

The court below joined with a split panel of the Third Circuit and the Eighth Circuit in holding that it is "only when Congress establishes a new cause of action without reference to preexisting law that § 1658 applies." *Jones*, 305 F.3d at 728 (quoting *Zubi v. AT&T Corp.*, 219 F.3d 220, 225 (3d Cir. 2000)); *see also Madison v. I.B.P.*, 257 F.3d 780, 798 (8th Cir. 2001). Nowhere can the concept of "without reference to preexisting law" be found in the plain language of § 1658, or from analyzing the established meaning of the terms used therein. As the Court has recognized, "[w]hen the language is plain, we have no right to insert words and phrases, so as to incorporate in the statute a new and distinct provision." *United States v. Temple*, 105 U.S. 97, 99 (1981). As demonstrated in Section A *supra*, even an amendment of a statute is an Act of Congress. As aptly observed in the dissent in *Zubi*, the interpretation that "an Act of Congress that establishes a new cause of action but refers to 'preexisting law' in doing so does not qualify as 'an Act of Congress' within the meaning of § 1658 . . . is not consistent with any known usage of the term." 219 F.3d at 231.

The Seventh Circuit bases its cramped interpretation on the belief that "[t]he language [of § 1658] simply does [not] address the eventuality when a cause of action 'arises under' two different 'Acts', one enacted before and one enacted after the effective date of § 1658." *Jones*, 305 F.3d at 724. This is simply not true. As explained in Section B *supra*, in accordance with the well-established meaning of the words "arising under," the law requires only that the act

"is a necessary element of one of the well-pleaded . . . claims." *Franchise*, 463 U.S. at 27-28. It is not at all unusual to have a cause of action "arise under" two or more acts. The Court faced this issue squarely in *Weinberger v. Salfi*, when it stated:

> The argument is that the present action arises under the Constitution and not under Title II [of the Social Security Act.] It would, of course, be fruitless to contend that [the plaintiffs'] claim is one which does not arise under the Constitution, since their constitutional arguments are critical to their complaint. But it is just as fruitless to argue that this action does not *also* arise under the Social Security Act.

422 U.S. 749, 760 (1975) (emphasis added).

In short, the Seventh Circuit's approach distorts the plain language of § 1658 as well as the consistently applied meaning of terms used therein. In doing so, it undermines the legislative intent behind § 1658 and instead creates a rule that will provide no uniformity in application.

D. A Holding That 28 U.S.C. § 1658 Applies to All Cases Under 42 U.S.C. § 1981 Based on Discriminatory Acts After Enactment of the Civil Rights Act of 1991 Is Most Consistent With Congress' Own Application of § 1658.

When Congress has created, through amendment, a new cause of action and they did not intend for § 1658 to apply, they have made it clear. For instance, an insight into Congress' application of § 1658 is gleaned by their treatment of the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745. The Securities Exchange Act of 1934 includes a private right of action for various types of

securities fraud. Similar to the Civil Rights Act of 1991, the Sarbanes-Oxley Act of 2002 amended the definition of "securities laws" in the Security Exchange Act of 1934 to expand the types of fraud violations eligible for a private right of action. 116 Stat. 745, 749 (2002). Thus, like the Civil Rights Act of 1991, the Sarbanes-Oxley Act created a new integrated cause of action, expanding what actions had been covered under the Securities Exchange Act of 1934.

Congress in the Sarbanes-Oxley Act, however, amended § 1658 to ensure that the four-year statute of limitations would not automatically apply to this new integrated cause of action.[5] In particular, Congress inserted an "(a)" before the prior wording of § 1658 and then added section (b), which provides:

> (b) Notwithstanding subsection (a), a private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), may be brought not later than the earlier of—
>
> (1) 2 years after the discovery of the facts constituting the violation; or
> (2) 5 years after such violation.

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[5] In this case, Congress wished to extend the 1 year and 3 year limitation periods mandated by the Supreme Court, in *Lamph v. Gilbertson*, 501 U.S. 350, 354-55 (1991), for private rights of action under § 10(b) of the Securities Exchange Act of 1934. *See* S. Rep. 107-146, at 17-18 (2002). Congress used its understanding of the effect of an amendment to an existing piece of legislation in making applicable the provisions of § 1658, as a device to effectuate this desire.

116 Stat. 745, 804. Given the addition of section (b) and, in particular, the use of the words "notwithstanding subsection (a)," it is reasonable to infer that Congress believed, in the absence of such an amendment to § 1658, the four-year statute of limitations under this section would apply to the new cause of action it created by amending (through the Sarbanes-Oxley Act) the Securities Exchange Act of 1934. In other words, where Congress wants to provide for a specific statute of limitations other than four years outlined in § 1658(a), it has expressly done so.

Moreover, in amending § 1658 to include section (b), Congress referred not only to the new claims that had been made possible by enacting the Sarbanes-Oxley Act, but to *all* private rights of action that existed under the Security Exchange Act of 1934. 28 U.S.C. § 1658 (b). Congress named the entire Securities Exchange Act of 1934 in section (b), suggesting that it believed the four-year statute of limitations would otherwise apply to *all* private rights of action for securities fraud, not just the ones added by the Sarbanes-Oxley Act. 28 U.S.C. § 1658(b) (emphasis added). When Congress passed the Civil Rights Act of 1991, they were well aware of the impact of § 1658, having enacted it only one year before. Had Congress intended for some other limitations period to apply other than that provided for in § 1658, they would have expressly provided for it as they did in amending the Securities Exchange Act of 1934.

II. AN ACROSS THE BOARD FOUR-YEAR STATUTE OF LIMITATIONS REFLECTS CONGRESSIONAL INTENT TO SIMPLIFY THE FEDERAL JUDICIARY'S TASK BY REDUCING THE BORROWING OF STATE LIMITATIONS.

Applying a four-year statute of limitations to all § 1981 claims after enactment of the Civil Rights Act of 1991 most consistently reflects legislative intent. When Congress enacted § 1658, it hoped to limit the extent to which federal courts had to borrow state statute of limitations while not upsetting the settled expectations of potential litigants. A uniform four-year statute of limitations would accomplish these goals most effectively, as well as increase judicial economy and reduce confusion among litigants.

A. An Across The Board Four-Year Statute Of Limitations Significantly Reduces The Need Of Federal Courts To Borrow State Statutes Of Limitations.

By enacting § 1658, Congress aimed to limit the practice of borrowing the most analogous state statute of limitations for federal claims. Many federal courts and a Federal Courts Study Committee established by Congress had called upon Congress to enact uniform federal statutes of limitation. *See, e.g., Sentry Corp. v. Harris,* 802 F.2d 229, 246 (7th Cir. 1986) (observing "[w]e join the growing number of commentators and courts who have called upon Congress to eliminate these complex cases, that do much to consume the time and energies of judges but that do little to advance the cause of justice, by enacting federal limitations periods for all federal causes of action."); *see also London v. Coopers & Lybrand,* 644 F.2d 811, 813 (9th Cir. 1981).

The House Report for § 1658 recognized that borrowing "creates a number of practical problems," and explained that,

> It obligates judges and lawyers to determine the most analogous state law claim; it imposes uncertainty on litigants; reliance on varying state laws results in undesirable variance among the federal courts and disrupts the development of federal doctrine on the suspension of limitation periods.

H.R. Rep. No. 101-734 at 24 (quoting Report of the Federal Courts Study Committee at 93). There are other obvious problems caused by the practice of borrowing. For example, use of state limitation periods that vary across the country pose temptations for forum shopping. This is especially problematic when plaintiffs in one case arising out of same controversy are from different states. Furthermore, borrowing requires federals court to master state law issues instead of relying on federal law.

An across the board four-year statute of limitations honors Congressional intent by significantly reducing the need of federal courts to borrow state statutes of limitation. Federal courts would impose a four-year statute of limitations for all § 1981 claims based on violations that occurred after the enactment of the Civil Rights Act of 1991. Only claims based on violations of § 1981 before the Civil Rights Act of 1991 would require borrowing of state statutes of limitations. This would improve judicial economy as federal courts would no longer have to search for and apply the most analogous state statute of limitations. In addition, an across the board four-year statute of limitations would provide consistency in federal courts across the country and

avoid problems that may arise when plaintiffs are from different states.

B. An Across the Board Four-Year Statute of Limitations Does Not Upset Settled Expectations.

Although wanting to limit the need to borrow state statute of limitations, Congress remained wary of upsetting the settled expectations of potential litigants. As a result, Congress chose not to impose the four-year statute of limitations retroactively, and instead limited the effect of § 1658 to subsequent Acts of Congress. As noted *supra*, Part I, Section B, the Civil Rights Act of 1991 created a new integrated cause of action under § 1981 combining coverage of discriminatory acts, independent of whether such acts occur before or after contract formation. This integrated cause of action did not exist in 1990, so no party could have settled expectations for such a claim. *Rivers*, 511 U.S. at 304 (recognizing that the 1991 Act "establish[ed] a new standard of conduct").[6]

C. An Across the Board Four-Year Statute of Limitations Injects Certainty and Consistency Into the Judicial Administration of § 1981 Claims.

In addition to reflecting Congressional intent, a four-year statute of limitations for all § 1981 claims is easily understood and applied. The Court has previously recognized advantages of bright-line tests and rules in other

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[6] In order to avoid upsetting reasonably held expectations, the relevant state statutes of limitations would still apply to any violations of § 1981 that occurred prior to date of the enactment of the Civil Rights Act of 1991.

contexts. For example, the Court rejected a definition of the term employee under Title VII that would "turn the coverage determination into an incredibly complex and expensive factual inquiry." *Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202, 210 (1997); *see also Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992) (rejecting an approach for defining employee that was "infected with circularity and unable to furnish predictable results").

Under an across the board approach, federal judges would only have to determine if the potential violations occurred after enactment of the Civil Rights Act of 1991 before imposing a four-year statute of limitations. This "bright-line" test would lead to increased efficiency and clarity. Judges would no longer have to engage in potentially fact-intensive inquiries to determine if claims were based on pre or post contract discrimination, and they would rarely have to search for the most analogous state statute of limitations.[7] Potential litigants, as well, could rely on an easily understood rule instead of wondering whether a state statute of limitations will apply and if so which one. As one court correctly observed, "[a]pplying section 1658 to

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[7] Under the Seventh Circuit approach, courts would need to engage in a fact-intensive analysis to first decide whether the claim before them is one for the making of contract claims (ones that *Patterson* recognized) or one for discrimination in the terms and conditions of employment (ones that *Patterson* did not recognize but now exist under the Civil Rights Act of 1991). This first step is no easy task. For example, as the Court in *Patterson* recognized, a promotion claim may or may not be a claim for the formation of a contract observing that it "depends upon whether the nature of the change in position was such that it involved the opportunity to enter into a new contract with the employer." 491 U.S. at 195. After a court sorts through this fact-intensive analysis, it then would need to determine the most applicable personal injury statute of limitations—another fact-laden inquiry. Congress in 1991 avoided this quagmire by creating the unified integrated § 1981 claim in which the four-year statute of limitations under § 1658 would apply to all claims.

claims arising after the enactment of the 1991 amendment is consistent with the cut-off for applying the amendment itself, and once the transitional cases clear the courts, ensures that a single statute of limitation will apply to all Section 1981 claims nationwide. In the long run, applying Section 1658 results in less, not more confusion." *Alexander v. Precision Machinery, Inc.*, 990 F. Supp. 1304, 1308 (D. Kan. 1997).

CONCLUSION

For the foregoing reasons, the *amici* respectfully request that the judgment of the Seventh Circuit be reversed. Moreover, the *amici* respectfully suggest that the best alternative would be to apply the four-year statute of limitations under 28 U.S.C. § 1658 to all civil actions under 42 U.S.C. § 1981 based on discriminatory actions after enactment of the Civil Rights Act of 1991, irrespective of whether the acts took place before or after contract formation.

Respectfully submitted,

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